CONFUSION OF THE DOCTRINE OF EQUITABLE ELECTION WITH ESTOPPEL BY DEED. — When a testator leaves property by will to A and purports to leave to B property belonging to A, equity considers it unconscionable for A to take the benefit under the will and, at the same time, to defeat the testator's intention as to B by retaining his own property. It therefore compels him to elect to surrender either his own property or his rights under the will.[1] A similar principle had been applied to wills in the civil law.[2] The English equity courts first applied it to wills,[3] and later extended it to deeds.[4] It had, however, no relation to the doctrine of estoppel by deed, which was much older and rested on distinct principles.

Estoppel, whether by record, by deed, or *in pais*, was originally a principle of the law of evidence. As the court would not allow proof of a fact contrary to a judgment of record on the same issue between the same parties, so it excluded all ordinary testimony that a statement under seal was contrary to fact,[5] or that one who performed a solemn act *in pais*, such as livery of seisin,[6] was without authority to do so. When, however, a jury found by special verdict that the facts were inconsistent with the statements in the deed or the solemn act *in pais*, the court passed on the facts as the jury found,[7] for the declaration of the jury was evidence of a higher nature. In other words, estoppel established no substantive rights, but merely excluded evidence of a lower character in rebuttal. And modern cases which have held that substantive rights have been acquired by estoppel, may usually be supported on some other ground.

When courts, therefore, following earlier *dicta*,[8] have decided cases by adopting as a rule of substantive law that he who takes under an instrument, whether deed or will, is estopped to deny the truth of any statement in the instrument, they have confused a mistaken conception of estoppel by deed with the doctrine of equitable election; and unjust results have naturally followed. Thus, when a testator bequeathed to A only that to which she was by law entitled and to B property belonging to A, the Supreme Court of North Carolina recently held that A, by proving the will and acting thereon, had elected to take under it, and was bound by the other provisions of the will to give her property to B. *Trip* v. *Nobles*, 48 S. E. Rep. 675. Obviously the doctrine of estoppel by deed should not apply, and there is no reason for equity to take away A's property and give it to B; for A received no substantial benefit to charge her conscience, nor, on the other hand, could B have received anything, had A elected against the will.

NATURE OF THE RIGHTS OF AN ESTOPPEL-ASSERTER. — Although there are suggestions in different cases that estoppel is purely personal in its nature and consequently operates only in favor of the person originally mis-

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1 Streatfield *v.* Streatfield, Cas. *t.* Talb. 176.
2 Inst. lib. 2, tit. 20, s. 4; tit. 24, s. 1.
3 Locy *v.* Anderson, Ch. Cas., ed. 1870, 155; Noys *v.* Mordaunt, 2 Vern. 581.
4 Bigland *v.* Huddleston, 3 Bro. C. C. 285 *n.*
5 Lit. 58; 34 H. VI, 48.
6 Co. Lit. 352 a.
7 Sutton *v.* Dicons, Sav. 98; Goddard's Case, 2 Co. 4 b.
8 Doe d. Devonshire *v.* Cavendish, 4 T. R. 743 *n.*, *per* Lord Mansfield; Wilson *v.* Townshend, 2 Ves. Jun. 696, *per* Lord Loughborough. *Cf.* also Goodtitle *v.* Bailey, Cowp. 601.